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21-ORD-260

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In re: Leah Mason/Kentucky Community and Technical College System

Summary: The Kentucky Community and Technical College System ("KCTCS") violated the Open Records Act ("the Act") when it entirely withheld a record under the attorney-client privilege instead of separating privileged material from non-privileged material and providing the latter as required under KRS 61.878(4).

Open Records Decision

On November 8, 2021, at 9:58 p.m., KCTCS employee Leah Mason ("Appellant") requested a copy of a record known variously as the "McBrayer Leadership Assessment Report" or "Leadership/Organizational Needs Assessment" ("the Assessment"), a document prepared by KCTCS's outside counsel, McBrayer PLLC, to analyze the KCTCS Office of Institutional Advancement for purposes of a proposed reorganization. KCTCS denied the request for the Assessment under the attorney-client privilege. Instead, KCTCS provided a three-page "executive summary" of the Assessment. This appeal followed.[1]

[1] KCTCS argues that this appeal is premature because it was initiated before KCTCS issued its "formal denial" of the request on November 29, 2021. However, the e-mails attached to the Appellant's appeal, dated November 16 and 17, 2021, clearly stated KCTCS's position that the Assessment was exempt from disclosure under the attorney-client privilege. Furthermore, an appeal is only premature if it is initiated prior to the expiration of the agency's response time of five business days. *See* KRS 61.880(1). Because KCTCS received the Appellant's request on November 9, 2021, it was required to fulfill or deny the request by November 16, 2021. Thus, the appeal is not premature.

On appeal, KCTCS claims that the Assessment is privileged both as an attorney-client communication and as attorney work product. The attorney-client privilege protects from disclosure "confidential communication[s] made for the purpose of facilitating the rendition of professional legal services to [a] client." KRE 503(b). "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." KRE 503(a)(5). The privilege applies to communications between a client or representative of a client and the lawyer, KRE 503(b)(1), as well as between representatives of the client, KRE 503(b)(4). KRS 61.878(1)(l) operates in tandem with KRE 503 to exclude from public inspection public records protected by the attorney-client privilege. *Hahn v. Univ. of Louisville,* 80 S.W.3d 771 (Ky. App. 2001).

The attorney work-product doctrine, on the other hand, "affords a qualified privilege from discovery for documents 'prepared in anticipation of litigation or for trial' by that party's representative, which includes an attorney." *Univ. of Kentucky v. Lexington H-L Services,* 579 S.W.3d 858, 864 Ky. App. 2018). "[D]ocuments which are primarily factual, non-opinion work product are subject to lesser protection than 'core' work product, which includes the mental impressions, conclusions, opinions, or legal theories of an attorney." *Id.* Records protected by the work-product doctrine may be withheld from public inspection under KRS 61.878(1)(l) and CR 26.02(3). *See Univ. of Kentucky,* 579 S.W.3d at 864–65.

The Appellant claims that she is entitled to a copy of the Assessment because she is a KCTCS employee who was interviewed during the assessment process and whose position was eliminated as a result of recommendations in the Assessment. Under KRS 61.878(3), "[n]o exemption in this section shall be construed to deny, abridge, or impede the right of a public agency employee, including university employees . . . to inspect and to copy any record including preliminary and other supporting documentation that relates to him." This Office has consistently recognized, however, that a public employee's right of access does not extend to records that are made confidential by state law, including records protected by the attorney-client privilege or the work product doctrine. *See, e.g.,* 10-ORD-177; 08-ORD-065; 04-ORD-045; 02-ORD-168; 98-ORD-124; 96-ORD-40. Accordingly, the Appellant does not have a right under KRS 61.878(3) to inspect or copy the Assessment insofar as it is privileged.

Nevertheless, "[t]he attorney-client privilege does not apply to all communications between an attorney and a client." *Commonwealth, Cabinet for Health and Family Services v. Scorsone,* 251 S.W.3d 328, 330 (Ky. App. 2008). When a party invokes the attorney-client privilege or the work product doctrine to shield documents in litigation, that party carries the burden of proof. That is because "broad claims of 'privilege' are disfavored when balanced against the need for litigants to have access to relevant or material evidence." *Haney v. Yates*, 40 S.W.3d 352, 355 (Ky. 2000) (quoting *Meenach v. General Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1995)).

Although an organizational assessment regarding a proposed reorganization may be conducted by an attorney, it is not inherently or self-evidently a rendition of professional legal services to a client. However, portions of such a document may contain legal advice or mental impressions in contemplation of litigation, which may be privileged material. The public agency claiming the privilege bears the burden of proof on this issue. KRS 61.880(2)(c).

In its response to the Appellant's request, KCTCS stated that the Assessment was "subject to attorney-client privilege withheld under KRE 503 as the McBrayer attorneys were rendering professional legal services to KCTCS." On appeal, KCTCS further asserts that the Assessment "contains advice from KCTCS' outside counsel regarding the legal liabilities involved with various courses of action available to its client, KCTCS, based on the findings of the assessment." This description, while minimal, meets the threshold to establish that at least portions of the document are privileged attorney-client communications or attorney work product.

However, while claiming privilege for the Assessment as a whole, KCTCS does not address the fact that it has already disclosed some of the information in the Assessment in the form of a three-page "executive summary." Under KRE 509, "[a] person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privilege matter." Therefore, KCTCS cannot claim that the entire Assessment is privileged because it—the client entitled to the privilege—disclosed to the Appellant those portions of privileged communications that are the substance of the executive summary. Under KRS 61.878(4), "[i]f any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination." Thus, KCTCS was required

to separate the privileged portions of the Assessment from the non-privileged portions that comprise the executive summary that KCTCS voluntarily disclosed, and provide the latter to the Appellant.

Furthermore, under KRS 61.880(1), a public agency must explain how an exception to the Act applies to the material withheld. The agency's explanation must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. App. 1996). This information "must be detailed enough to permit [a reviewing] court to assess [the agency's] claim and the opposing party to challenge it." *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 81 (Ky. 2013). Therefore, KCTCS was required to provide a description sufficient to allow the Appellant to judge the propriety of each redaction. *See City of Fort Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 848-49 (Ky. 2013). Because KCTCS withheld the entire document, instead of separating exempt information from nonexempt information and providing the latter along with an explanation for each redaction, it violated the Act.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

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/s/ James M. Herrick

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